No. 12396.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WARREN H. PILLSBURY,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Appellees respond to Appellant's brief as follows:

Facts.

Plaintiffs (appellees here) brought an action in the United States District Court in San Francisco, to enjoin the enforcement of an award under the Naval Bases Act of August 16, 1941, as amended December 2, 1942. [Tr. 2.] Defendant Laird was injured while in the employ of one plaintiff on Johnston Island on December 2, 1941, and the injury was aggravated on January 13, 1942, while said defendant was in the employ of another plaintiff. Plaintiffs paid said defendant $3,750.00 each, totaling $7,500.00, which was the maximum prescribed by 33 U. S. C. A.

914(m) as of the time of the accidents. Because plaintiffs include *two employers* and there were two accidents, the second aggravating the residual condition left after recovery from the first accident, the defendant Deputy Commissioner (appellant here) made an award under which the insurance carriers for the two employers split the weekly payment to defendant Laird on a 50-50 basis, $12.50 per week each.

After the $7,500.00 maximum prescribed by Section 914(m) was paid out, the appellees petitioned to terminate the award. [Tr. 28, 51.] Appellant Pillsbury denied the petition. [Tr. 34, 37, 57.] The trial court granted plaintiffs an injunction against defendants' further enforcement of the award. [Tr. 8-13.] The defendant Commissioner appealed. [Tr. 13.]

ARGUMENT.

Appellant has raised several alleged issues on this appeal.

1st. He questions the jurisdiction of the United States District Court to render justice in accordance with the Act of Congress on a very technical ground, to wit, that a finding that defendant Laird sustained two distinct injuries long ago became final, *i.e.,* in the original awards. [Tr. 3-4, 22-27, 46-50.]

2nd. He questions the power of the Courts to hold that a finding of fact by the Commissioner has resulted in an award "not in accordance with law," under 33 U. S. C. A. 921.

3rd. He contends that the Act of Congress should be construed to mean that the employee's maximum recovery is unlimited, except that he cannot recover more than $7,500.00 from each employer.

4th. He contends that where two separate accidents result in a disabling condition, the second trauma aggravating the condition created by the first, the law does not compel any apportionment of the liability between the employers for whom the work was being done at the time of the accidents.

Law.

A brief discussion of the law is indicated before appellant's points are separately analyzed.

Section 914(m), 33 U. S. C. A., as it stood at the time of the accidents and awards here involved reads as follows [Tr. 4, Part IV]:

> "914(m). The total amount payable under this Act for injury or death shall in no event exceed the sum of $7500.00."

Prior to the decision of Judge Lewis Goodman, in this case, said section had not been authoritatively construed or applied by a Federal Court. [Tr. 8-13.]

Appellees contend that said section is unambiguous and is capable of only one construction. Due effect must be given to each and every clause thereof.

United States v. Wiltberger (1820), 5 Wheat. 76, 99, 5 L. Ed. 37 (clear meaning);

Adams v. Woods (1805), 2 Cranch. 336, 2 L. Ed. 297 (effect to every part of Statute);

Calif. v. Deseret Water Co. (1917), 243 U. S. 415, 420, 61 L. Ed. 821.

In applying such a distinctly worded section, the Courts will ever keep in mind the obvious intent of the legislative body.

Waskey v. Hammer (1912), 223 U. S. 85, 94-95, 46 L. Ed. 359;

P. R. Ry. Co. v. Mor (1920), 253 U. S. 345, 64 L. Ed. 944.

What does it say? If unambiguous, it surely "means what it says, and says what it means."

It starts off: *The total amount payable under this act.* *Total* certainly means the absolute maximum. *Payable* certainly means *by the employer and to the employee,* in the absence of either qualifying expression.

The next phrase: *for injury or death,* has been authoritatively construed to mean *for either injury or death but not for both,* so that where both occur the maximum for

either is $7,500.00 but if both occur, a theoretical maximum of $15,000.00 is established.

Intl. Merc. Marine Co. v. Lowe (C. C. A. 2d, 1938), 93 F. 2d 663 (actual total awards $13,500.00);

Norton v. Travelers Ins. Co. (C. C. A. 3rd, 1939), 105 F. 2d 122.

The third phrase is significant: *shall in no event exceed $7,500.00.* If it is conceivable that some injury or death may result in an award in excess of $7,500.00, then the words *in no event* must be regarded as stricken from the statute and rendered meaningless. It does not say *shall usually* not exceed $7,500.00; it says *in no event. In no event* means *never.* It means *absolutely never,* or else it is a contradiction in terms.

Two Injuries.

A clever approach, used by the Government, is to admit all the above, but to contend that here there were *two injuries.* The second accident aggravated the prior condition, or in the Commissioner's own words:

> "Said strain aggravated and increased disability from which claimant was already suffering in his back, consisting of an incipient herniation of a nucleus pulposus of the lower spinal column which had sustained by injury of December 2nd, 1942 * * *." [Tr. 48, Cf. Tr. 24.]

Now, if this second strain or trauma was a new injury, within the meaning of the Act, then one of two alternatives should govern:

(1) Either the first employer should be off the hook completely, since his "injury" obviously didn't cause the second disability; or

(2) It should be regarded as a *second injury* regardless of the number of employers involved. For surely, it cannot be a *second injury* merely because the employee has changed jobs!

However, the uniform practice in the Workmen's Compensation field has been to *apportion liability* when two or more employers are involved and separate accidents have resulted in a single condition, the later accident having *aggravated the condition caused by the earlier.*

3 Schneider's Workmen's Compensation (1943), p. 514;

Hanna, I. A. C. Practice & Proc. (1943), p. 389;

O'Brien v. Albrecht Co. (1919), 206 Mich. 101, 172 N. W. 601, 6 A. L. R. 1257 (aggravation of hernia);

Weaver v. Maxwell Motor Co. (1915), 186 Mich. 588, 152 N. W. 993, L. R. A. 1916B 1276 (loss of one remaining eye, held only a partial disability);

White v. Taylor (La. App., 1941), 5 So. 2d 337;

Empl. Cas. Co. v. U. S. F. & G. Co. (Ark., 1949), 214 S. W. 2d 774;

Blanchard v. I. A. C. (1924), 68 Cal. App. 65, 228 Pac. 350 (industrial disease, 3 employers);

Assoc. Indem. Corp. v. I. A. C. (1932), 124 Cal. App. 378, 12 P. 2d 1075 (occupational disease);

Rubattino v. I. A. C. (1944), 65 Cal. App. 2d 288, 150 P. 2d 538 (occupational disease);

24 American Law Reports, p. 1467, Note;

39 American Law Reports, p. 1276, Note.

In Federal practice this rule is recognized. *Apportionment of the weekly indemnity was ordered in this very case on that ground.* [Tr. 24, 48.]

If the aggravation here had occurred after the employee had returned to work for the *same employer,* we take it that there would be no argument about *two injuries* or in favor of double liability. Common sense and case law unite in revolt against any such absurdity, and the Government concedes the point. (Brief for Appellant, p. 16.)

Lumberman's Mutual etc. v. Locke (C. C. A. 2d, 1932), 60 F. 2d 35, 37.

The Government argues that if each employer knows he has a limit of $7,500.00, that's enough.

But why should there be a distinction in favor of an employee with multiple employers, a discrimination in his favor as against the employee with a single employer? Is that what Congress wanted?

Compare:

(1) *A* works for *B*. *A's* back is injured. Four weeks later *A* returns to work. One month later a new accident aggravates the back condition and produces total disability. One employer, clear limit $7,500.00.

(2) Same facts, but when *A* goes back to work after first accident, he works for *C* instead of *B*. Two employers, therefore (says Government) limit $15,000.00.

We know that the best and most worthy employees will remain longer with a single employer. By what form of logic should the Government discriminate in favor of the employees who shift employment most frequently?

And what will the Commissioner rule in a case where the two employers have a single insurance carrier?

Won't the practical result be that no insurance carrier will allow an employer to hire an employee who has any residual condition from a prior accident which might be aggravated by some new strain, because such "aggravation" would result in double liability, perhaps for the same insurance company?

Purpose of Act.

In this case all parties freely admit that Section 914(m) was enacted for the benefit of the employer class—not for the benefit of the employees. (Cf. Brief for Appellant, p. 16.) Since liberal construction is the rule applicable to the Longshoremen's Act (Cf. Brief for Appellant, p. 24), it must be conceded that the section should be broadly, fairly and liberally construed and applied *to carry out the intent of Congress, i.e.,* to protect the employer class and not to extend the benefits of employees, *which would defeat the Congressional intent.* Other provisos of the law, designed for the employees' benefit should be correspondingly treated to fully effect the intent of Congress to benefit injured servants. Congress, in abolishing the common-law defenses of the employer and in substituting bureaucratic determination of liability for the age-old jury trial

methods, gave the employers one and only one new benefit, *limited liability*. This latter statement is recognized as being true of nearly all Workmen's Compensation Acts.

1 Campbell on Workmen's Compensation (1935), p. 28;

Costanzas v. Com. Canners, 51 Ont. L. Rep. 166, 11 Brit. Rul. Cases 982;

27 Cal. Jur. 259, Work. Comp., Secs. 2 to 4;

28 R. C. L. 713, Work. Comp. Acts, Sec. 2;

Hanna, I. A. C. Practice & Procedure (1943), pp. 8-14.

It is at once apparent that if this one small crumb tossed to employers is to be construed liberally *in favor of employees,* as the Government contends (Brief for Appellant, p. 23), the Courts will in effect abandon the enlightened doctrine of trying to carry out legislative design in favor of the now disgraced doctrine of *Strict Construction,* a doctrine which originated in the hearts of common law judges who tried to soften the rigors of an inhumane criminal law system.

The only way that Section 914(m) can be liberally construed in favor of employees is to strictly or narrowly construe it against employers. That would be tantamount to a judicial conspiracy to defeat the unquestionable intent of the Congress of the United States. That such a request should be boldly made in the Government's brief is, to say the least, very surprising.

New York Precedents.

The Act of Congress was based on the New York statute. Hence, the cases of the courts of that state are valuable tools to the Federal judiciary.

Case v. Pillsbury (C. C. A. 9th, 1945), 145 F. 2d 392;

Kobilkin v. Pillsbury (C. C. A. 9th, 1939), 103 F. 2d 667;

West Pa. Co. v. Norton (C. C. A. 3rd, 1938), 95 F. 2d 498.

Apportionment of liability between employers, where a condition is aggravated while working for a second master, is the standard New York rule.

Anderson v. Babcock & Wilcox Co. (1931), 256 N. Y. 146, 175 N. E. 654 (second fracture of pelvis);

Cox v. Roosevelt Hosp. (1937), 298 N. Y. Supp. 799;

Mazoreh v. Rochester Co. (1938), 4 N. Y. S. 2d 249.

Obsta Principiis.

The trial court also considered the basic common law maxim, *obsta principiis,* Resist Beginnings.

Boyd v. United States (1886), 116 U. S. 616, 635, 29 L. Ed. 746, 6 S. Ct. 524.

If the Government can sap and mine at the foundations of Section 913(m), as here attempted, they can soon cause its complete collapse. Soon they will argue that the *Locke* case, 60 F. 2d 35, should be ignored and that the principle

of double and multiple liability should be as valid against a single employer as against multiple employers.

No doubt, also, they may soon argue that *partners* and *joint enterprisers* are *severally liable* each for the statutory maximum even in the case of a single accident, because they will have read into the law that dangerous phrase "by each employer," and they will argue that each partner is an employer. They will contend that such doctrine is required by Liberal Construction, since it would benefit the employee.

It is respectfully submitted that all the principles of sound and liberal construction require that the decision of the trial court's view be upheld, and in this connection we cite the leading cases considered by the trial court.

Denn v. Reid, 10 Pet. 524, 9 L. Ed. 519;

Heydon's case (1584), 3 Coke 7A, 14 Eng. Ruling Case 816;

Cohen v. Virginia, 6 Wheat. 264, 5 L. Ed. 257;

Ross v. Doe, 1 Pet. 665, 7 L. Ed. 302.

We now proceed to answer the Appellant's arguments, *seriatim.*

1. Difficulty re Jurisdiction.

The Government contends that the Federal Courts lack any jurisdiction over this problem because of an asserted finding by the appellant Commissioner that there were *two separate injuries.*

Even the facts as recited in the opening brief of appellant show how absurd is this purported difficulty.

It is respectfully submitted that, as above pointed out, the Commissioner distinctly found that the residual condi-

tion caused by the first accident was aggravated by the second accident, resulting in a single, continuing disability, for which liability was apportioned. [Tr. 24, 26, 48, 50.]

There was no finding of two injuries. The Commissioner's language in the 1942 findings was singular, not plural. *E.g.:*

> "That as a result of his *injury* sustained claimant was wholly disabled * * *.
>
> From June 16 claimant has been wholly disabled indefinitely by reason of said *injury.* * * *" (Italics supplied.) [Tr. 50; cf. Tr. 24.]

Medical expenses, which were superadded to the $7,500.00 paid out, were awarded on a 50-50 basis against the two employers. [Tr. 26, 48.]

This is wholly dissimilar from a case where an accident at one employer's place of business results in loss of two fingers of the right hand, and a second accident thereafter disables the left foot, at another employer's factory. *Such are clearly separate injuries resulting from separate accidents.*

This case is universally regarded as a case of a *single injury resulting from separate accidents* and requiring apportionment of liability.

2. Review of Finding of Fact.

The second point of Appellant's truly falls by its own weight, or lack of weight. He contends his nonexistent finding of two injuries is not reviewable because it is supported by substantial evidence.

He fails to cite any transcript reference to such a finding or to any evidence which could support such a finding.

An *injury* is, of course, the damage, condition or hurt suffered by the employee, just as *death* is a condition resulting from the accident. The terms *accident* and *injury* as not used synonymously.

> *Grain Handling Co. v. McManigal* (C. C. A. 2d, 1939), 102 F. 2d 464.

If *injury* means *accident,* then consistency would require the term *death* in Section 914(m) to be held to be limited to cases where *death* resulted immediately from an event in the course of employment, rather than *death resulting from any accident which occurs in employment.* Such construction would be absurd. See *Intl. Mer. Mar. Co. v. Lowe* (C. C. A. 2d, 1938), 93 F. 2d 663, which held that where a single accident results in a disabling injury for which the employee draws $6,000 at $25.00 a week, and then dies, as a result of the same original accident, a new award of $7,500 for the death may issue.

In the instant case, if the two accidents resulted in separate injuries, it would be unconstitutional to hold the first employer partially responsible for the damage resulting from the second accident. Suppose, *A* lost his right hand while working for *B,* and obtained an award therefor. Later *A* worked for *C* and in a new accident became 100% disabled. Could a Court uphold a new award of $7,500 against *B* on the theory that if *A* still had his right hand, he might not be 100% disabled? It was the duty of the trial court to construe the law so as not to render it in conflict with the Constitution by depriving any person of property without due process of law.

> *U. S. v. Jin Fuey Moy,* 241 U. S. 394, 60 L. Ed. 1061, 36 S. Ct. 658.

The term *injury* is, of course, defined in Section 902(2) of 33 U. S. Code. It means an accidental injury arising out of and in the course of employment.

Therefore, unless it means the physical condition produced by accidental means (which, here, is admittedly singular, not plural), then there is no basis at all for apportioning the award and holding the first employer partially responsible for the total disability which followed the second accident. *No one can contend that the second accident occurred in the course of the first employment.* Therefore, if *accident* means *injury,* the *second injury* was not in the course of the first employment. The law grants compensation only in case of injury in the course of employment, as is clear from a reading of Section 903(a) with 902(2).

Here, the two accidents operated jointly to cause a single total disability, *or so the Appellant Commissioner found.* [Tr. 25, 49.] The original accident, alone, had only caused eight (8) days of temporary total disability, which cost the employer only $28.57. [Tr. 24.] Then the employee returned to work, *and worked* for a full month. [Tr. 24.]

Clearly the only factual basis for holding the first employer liable at all is that the *present injury,* which resulted in continuing total disability, was caused jointly (1) by the condition remaining from the first trauma and (2) by the accident five weeks following the first trauma. These produced a single injury described medically as a rupture or herniation of the nucleus pulposus.

3. Section 914(m) as Employer's Provision.

We have already treated fully in our argument, the meaning and effect of Section 914(m), 33 U. S. Code.

We add that Appellant's distinction between Section 8(a) and (6) of the Act, 33 U. S. C. 918 (Brief, pp. 14-15) is mere sophistry. What need is there to limit the number of weeks in Section 918, when Section 914 places an overall limit of $7,500.00? Is Congress to presume that deputy commissioners cannot divide $7,500.00 by $25.00 and determine the number of weeks by themselves without legislative aid?

If each accident resulted in a separate injury, we ask, why did not the employee have a right to $50.00 a week? Obviously, because the injury had two sources, and if more than one employer were to be held at all, the liability had to be divided. The one injury concept is illustrated by the single operation, cost of which was divided. [Tr. 48.]

We again emphasize that if both these accidents had occurred while in the employ of the same employer, everyone would agree it was one injury with one $7,500.00 maximum. How absurd it is to multiply the benefits of the employee by the number of his employers, and thus put a premium on not holding a steady job!

4. Anti-Apportionment Doctrine.

The last point made by Appellant is that separate maximum awards for separate injuries from separate accidents while employed by separate employers are justified.

With such a generalization little fault can be found. But how can two separate accidents each result independently in total permanent disability?

Or how can two separate accidents each result in two separate deaths? For if the Commissioner's argument be sound, if the employee here, after obtaining the two separate $12.50 per week awards, had died as a result of the injury (or injuries), his widow would be entitled to two separate $7,500.00 death awards, as death in each case, it would be argued, resulted from a separate injury!

No doubt the two employers, in case of such death, would be jointly liable for the death, and would have to pay $7,500.00 total, as in the case of *Intl. Merc. Marine Co. v. Lowe* (C. C. A. 2d, 1938), 93 F. 2d 663, 115 A. L. R. 896.

It is respectfully submitted that a single back condition, resulting from two independent traumatic events, can no more result in two separate injuries than it can result in two separate deaths.

The Appellant's anti-apportionment doctrine should be completely repudiated. His inability to find any precedent (Brief of Appellant, p. 19) results merely from his ignoring all cases of apportionment.

Statutory Recognition.

The statute itself recognizes the Apportionment Doctrine. 33 U. S. C. A. 908(f) reads, in part, as follows:

> "(f) Injury increasing disability. (1) In case an employee receive an injury which of itself would cause only permanent partial disability but which, combined wtih a previous disability, does in fact cause permanent total disability, *the employer shall provide*

*compensation only for the disability caused by the subsequent injury; * * *"*

See:

Nat. H. H. Assn. v. Britton (1945), 147 F. 2d 561.

It is thus clear that in this case the second employer could in no event have been held liable for $7,500.00, or full permanent disability as long as the Commissioner found that there was a previous disability which contributed substantially to the total disability. The Commissioner now attempts to do by indirection what the statute expressly forbids.

New York Rule.

We have already cited *supra* several New York cases recognizing the apportionment doctrine. Appellant has cited one New York case which he contends is against apportionment. (Brief for Appellant, p. 20.)

We are unaware of the source of Appellant's knowledge of the facts of the case of *Berner v. Caruso* (1922), 233 N. Y. 614, 135 N. E. 941, s. c. 201 App. Div. 866. The reported memoranda decisions give no such facts. The facts, as we gather them were that an employee obtained a lump sum settlement in 1917, as for a total disability. If divided on a weekly basis, the sum would have covered the period through March of 1924. However, the "gold cure" worked and he recovered sufficiently to return to work. In July, 1920, he was again the victim of an industrial accident. He got a new award, which the Courts

upheld. *There are no facts reported which indicate that the residual condition from the first accident was a part of the causation of the disability which followed the second accident.* It was, therefore, not a case which required apportionment. *There is not one word in the memoranda against the theory of apportionment where a later accident aggravates an earlier disability.*

Wherefore, appellees submit that the judgment below should be affirmed.

Respectfully submitted,

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